No. 80-744

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND ALVIN ARCINIEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Bifulco v. *United States*, No. 79-5010 (June 16, 1980) 1

United States v. *Aloisio*, 440 F. 2d 705 3

United States v. *Antonick*, 481 F. 2d 935, cert. denied, 414 U.S. 1010 3

United States v. *Ayers*, 426 F. 2d 524, cert. denied, 400 U.S. 842 3

United States v. *Beathune*, 527 F. 2d 696, cert. denied, 425 U.S. 996 3

United States v. *Biondo*, 483 F. 2d 635, cert. denied, 415 U.S. 947 3

United States v. *Cooper*, 464 F. 2d 648, cert. denied, 409 U.S. 1107 3

United States v. *Crutchley*, 502 F. 2d 1195 4

United States v. *Heck*, 499 F. 2d 778, cert. denied, 419 U.S. 1088 3

Statute and rules:

21 U.S.C. 960 and 963 1

Fed. R. Crim. P. 6(d) 3

Fed. R. Crim. P. 6(e)(1) 3

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Petitioner contends (1) that he was denied due process of law because the testimony of some witnesses before the grand jury was recorded while the testimony of a federal agent was not and (2) that his conviction was coerced by the trial judge's post-verdict response to a confused juror.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. 960 and 963. He was sentenced to a prison term of 12 years, to be followed by 25 years' special parole. In an unpublished opinion (Pet. App. A), the court of appeals affirmed the judgment of conviction and the sentence of imprisonment; however, in light of this Court's decision in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), the court of appeals sua sponte vacated the special parole term (Slip op. A11).

1. In November 1978 and February 1979, two of petitioner's associates appeared before a grand jury investigating a narcotics conspiracy. Their testimony was recorded and transcribed. In March 1979, a federal agent summarized for the grand jury the government's evidence against petitioner, including information provided by an accomplice. The agent's testimony was not recorded (Pet. App. A2).

Petitioner claims (Pet. 10-13) that the selective recording of grand jury testimony denied him due process because it put the government "in a position to impeach defense witnesses with their grand jury transcripts" while he had no similar opportunity to attack the credibility of an accomplice[1] whose information the agent had summarized for the grand jury.

Petitioner does not claim, however, nor could he, that his defense was actually disadvantaged by the availability of transcripts of the grand jury testimony of defense witnesses.[2] And even assuming that petitioner somehow could have impeached the government's accomplice-witness with the *agent's* summary of statements allegedly made by the accomplice, the same end could have been achieved using

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[1]Petitioner's somewhat ambiguous reference to "the testimony of the accomplice and informant" (Pet. 11) apparently is directed at a single person, Michael Jo Schrump (Tr. 4-5), who conspired with petitioner to import cocaine, was apprehended at the border with cocaine in his possession, and thereafter assisted the government in apprehending petitioner (Tr. 43-62).

[2]Petitioner called two witnesses. The only use made of their grand jury testimony was the prosecutor's question to the first witness, Kent Lofthus, concerning his statement to the grand jury that he did not know what business petitioner engaged in (Tr. 165-166). Lofthus' grand jury testimony was not, however, inconsistent with his testimony at trial that he had seen furs in petitioner's house, inasmuch as he did not draw the conclusion that petitioner was a fur importer or that he was engaged in any particular business (see Tr. 159-164).

the case agent's reports, his affidavit in support of the complaint, and a note handwritten by the accomplice, all of which were turned over to petitioner prior to trial (Tr. 12).

Beyond this, there is simply no due process requirement that the government transcribe testimony given to a grand jury. *United States* v. *Biondo,* 483 F. 2d 635 (8th Cir. 1973), cert. denied, 415 U.S. 947 (1974); *United States* v. *Cooper,* 464 F. 2d 648 (10th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). Nor did any statute in force when the grand jury sat in this case require that grand jury testimony be recorded. At that time, Fed. R. Crim. P. 6(d) provided that recordings "may" be made of the evidence presented—a provision uniformly interpreted to mean that recording was permissive rather than mandatory. See *United States* v. *Heck,* 499 F. 2d 778 (9th Cir.), cert. denied, 419 U.S. 1088 (1974); *United States* v. *Aloisio,* 440 F. 2d 705 (7th Cir. 1971), and cases cited therein. Accordingly, the recording of the testimony of some, but not all, grand jury witnesses has never been thought to constitute a basis for dismissal of an indictment. See *United States* v. *Beathune,* 527 F. 2d 696 (10th Cir. 1975), cert. denied, 425 U.S. 996 (1979); *United States* v. *Antonick,* 481 F. 2d 935, 937 (9th Cir.), cert. denied, 414 U.S. 1010 (1973); *United States* v. *Ayers,* 426 F. 2d 524 (2d Cir.), cert. denied, 400 U.S. 842 (1970).

In denying review in *United States* v. *Beathune, supra,* this Court declined to consider a claim virtually identical to the one raised here. There is even less reason to grant review in this case because an intervening amendment to Rule 6 has resolved any dispute concerning the desirability or necessity of recording grand jury testimony. A new subsection, Fed. R. Crim. P. 6(e)(1), requires that "[a]ll proceedings" before the grand jury be recorded except when the members are deliberating or voting. In light of this Rule, which

became effective August 1, 1979, any prior disagreement among the courts of appeals on this point has become moot.[3]

2. Petitioner was tried on one count of conspiracy to import cocaine and on two substantive counts. After the jury announced a verdict of guilty on all three counts, the court sua sponte conducted a jury poll. In a colloquy with the court (set out at Pet. App. A5-A8), Juror No. 1, like her fellow jurors, specifically stated that she had voted guilty on all counts. However, she expressed confusion about whether petitioner's participation in the conspiracy meant that he was guilty on the other charges as well. After the jury poll had been completed, the court returned to Juror No. 1 who asked (*id.* at A6): "The other two counts I believe follows the first count of conspiracy overall, the whole thing; right?" When the court explained that her assumption was incorrect, the juror said: "I see. Well, I agreed" (*id.* at A7). After the juror expressed further confusion about the substantive charges, the court asked (*id.* at A7-A8):

> All right. Is there any question, however any question at all, that you voted for guilty on the conspiracy?
>
> JUROR NO. 1: Guilty with intent of conspiracy, there is no question.

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[3]There is, accordingly, no occasion for this Court to address the asserted conflict between the decision below and *United States* v. *Crutchley*, 502 F. 2d 1195, 1199-1200 (3d Cir. 1974). We note, however, that the discussion of this issue in *Crutchley* is dictum, and that the rule enunciated therein that "*[i]f* the testimony of any grand jury witness or witnesses is to be recorded * * * all such testimony should be recorded * * *" (*id.* at 1200) was to be applied prospectively. We further note that in view of the Advisory Committee's then-pending deliberations on proposed changes in Rule 6, the *Crutchley* court expressly refrained from *requiring* that grand jury testimony be recorded (*id.* at 1200 n.5).

THE COURT: No question about the guilt on Count One, the conspiracy charge as I read it to you?

JUROR NO. 1: Right.

THE COURT: No question in your mind now?

JUROR NO. 1: No question.

The court then accepted the verdict on the conspiracy count and declared a mistrial as to the other charges (Pet. App. A8).

On this record, there is nothing in petitioner's claim (Pet. 13-15) that the court's colloquy with Juror No. 1 coerced the verdict against him. Quite to the contrary, the juror had already voted to convict petitioner and had said so during the jury poll. In her discussion with the court after the poll, the juror indicated not the slightest doubt about her vote of guilty as to the conspiracy charge, even though the court provided her ample opportunity to express reservations about it, an opportunity she did not hesitate to use in discussing her vote on the other two charges. Accordingly, the court's colloquy did not require the juror to "decide the Petitioner's fate in open court" (*id.* at 15); rather, to petitioner's considerable benefit, the exchange simply allowed the court to determine whether the juror's previously-cast vote of guilty on all three counts reflected her informed judgment of the case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

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